

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

2 Name KNIGHT TENACE D.
 3 (Last) (First) (Initial)

Prisoner Number T-75937Institutional Address P.V.S.P (ASU-190), P.O. Box 8505, Coalings, CA 93226

2007 FILED
 OCT 14 2009
 (ENDORSED)
 L.E.

*E-filing***UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

DAVID H. YANAGISAWA
 Clerk of Court
 Superior Court of California County of Santa Clara
 DEPUTY

8 TENACE DEMONIC KNIGHT

9 (Enter the full name of plaintiff in this action.)

10 VS.

11 CALIFORNIA DEPARTMENT OF
 12 CORRECTIONS

14 (Enter the full name of respondent(s) or jailor in this action)

Case No. CC469460

(To be provided by the clerk of court)

**PETITION FOR A WRIT
OF HABEAS CORPUS**

C 10 0276

SBA

16 Read Comments Carefully Before Filling In**When and Where to File****(PR)**

18 You should file in the Northern District if you were convicted and sentenced in one of these
 19 counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa,
 20 San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in
 21 this district if you are challenging the manner in which your sentence is being executed, such as loss of
 22 good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

23 If you are challenging your conviction or sentence and you were not convicted and sentenced in
 24 one of the above-named fifteen counties, your petition will likely be transferred to the United States
 25 District Court for the district in which the state court that convicted and sentenced you is located. If
 26 you are challenging the execution of your sentence and you are not in prison in one of these counties,
 27 your petition will likely be transferred to the district court for the district that includes the institution
 28 where you are confined. Habeas L.R. 2254-3(b).

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

Santa Clara County

100 W. Market St.

San Jose, CA 95110

Court

Location

(b) Case number, if known H031365

(c) Date and terms of sentence MARCH 23, 2007 - 4-4 yrs & mos 05%

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes X No _____

Where?

Name of Institution: Pleasant Valley State Prison

Address: P.O. Box 8505 (ASU-190), Coalville, CA 93210

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

4 counts of 2nd degree Robbery in Violation of PC 211-212(c) during Comm. of 12022.53

(b) 1 count of 2nd degree Robbery in Violation of PC 211-212.5(c) during (comm. of 12022.53(a), attempted

1 count of Reckless Driving 2800.2(a), 1 count of theft or unauthorized use of a vehicle 10851(a), 1 count assault with a fire arm 2458(2), 1 count of possession of a firearm by a felon 12021(a)(1), with priors within sections 667(b) through (i) & priors within 667(a) & 667.5(b)...

PET. FOR WRIT OF HAB. CORPUS

3. Did you have any of the following?

Arraignment: Yes No _____

Preliminary Hearing: Yes No _____

Motion to Suppress: Yes No _____

4. How did you plead?

Guilty _____ Not Guilty Nolo Contendere _____

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury Judge alone _____ Judge alone on a transcript _____

6. Did you testify at your trial? Yes _____ No _____

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes No _____

(b) Preliminary hearing Yes No _____

(c) Time of plea Yes No _____

(d) Trial Yes No _____

(e) Sentencing Yes No _____

(f) Appeal Yes No _____

(g) Other post-conviction proceeding Yes No _____

8. Did you appeal your conviction? Yes No _____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes No _____

Year: 2008 Result: Denied

Supreme Court of California Yes No _____

Year: 2008 Result: Denied

Any other court Yes No _____

Year: 2008 Result: Denied

(b) If you appealed, were the grounds the same as those that you are raising in this

1 petition? Yes No 2 (c) Was there an opinion? Yes No

3 (d) Did you seek permission to file a late appeal under Rule 31(a)?

4 Yes No

5 If you did, give the name of the court and the result:

6 Santa Clara County - Denied7
8 9. Other than appeals, have you previously filed any petitions, applications or motions with respect to
9 this conviction in any court, state or federal? Yes No 10 [Note: If you previously filed a petition for a writ of habeas corpus in federal court that
11 challenged the same conviction you are challenging now and if that petition was denied or dismissed
12 with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit
13 for an order authorizing the district court to consider this petition. You may not file a second or
14 subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28
15 U.S.C. §§ 2244(b).]16 (a) If you sought relief in any proceeding other than an appeal, answer the following
17 questions for each proceeding. Attach extra paper if you need more space.18 I. Name of Court: Santa Clara County19 Type of Proceeding: Romero hearing

20 Grounds raised (Be brief but specific):

21 a. Tried to get my prior strike stricken

22 b. _____

23 c. _____

24 d. _____

25 Result: Denied Date of Result: 3/21/2007

26 II. Name of Court: _____

27 Type of Proceeding: _____

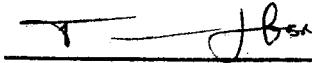
28 Grounds raised (Be brief but specific):

1
2
3 10. Does the complaint which you are seeking to file raise claims that have been presented in
4 other lawsuits? Yes No
5 Please list the case name(s) and number(s) of the prior lawsuit(s), and the name of the court in which
6 they were filed.
7
8

9 I consent to prison officials withdrawing from my trust account and paying to the court the
10 initial partial filing fee and all installment payments required by the court.

11 I declare under the penalty of perjury that the foregoing is true and correct and understand
12 that a false statement herein may result in the dismissal of my claims.

13
14 9/2/09


15 DATE SIGNATURE OF APPLICANT
16
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PRIS. APPLIC. TO PROC. IN FORMA

PAUPERIS, Case No. _____

a. _____
b. _____
c. _____
d. _____

5 Result: _____ Date of Result: _____

6 III. Name of Court: _____

7 Type of Proceeding: _____

8 Grounds raised (Be brief but specific):

9 a. _____
10 b. _____
11 c. _____
12 d. _____

13 Result: _____ Date of Result: _____

14 IV. Name of Court: _____

15 Type of Proceeding: _____

16 Grounds raised (Be brief but specific):

17 a. _____
18 b. _____
19 c. _____
20 d. _____

21 Result: _____ Date of Result: _____

22 (b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

23 Yes _____ No _____

24 Name and location of court: _____

25 B. GROUNDS FOR RELIEF

26 State briefly every reason that you believe you are being confined unlawfully. Give facts to
27 support each claim. For example, what legal right or privilege were you denied? What happened?

28 Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

3
4 [Note: You must present ALL your claims in your first federal habeas petition. Subsequent
5 petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant,
6 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

7 Claim One: SEE ATTACHED PAPER
8

9 Supporting Facts:
10

11 Claim Two: SEE ATTACHED PAPER
12

13 Supporting Facts:
14

15
16 Claim Three: SEE ATTACHED PAPER
17

18 Supporting Facts:
19

20
21
22
23 If any of these grounds was not previously presented to any other court, state briefly which
24 grounds were not presented and why:
25

26
27
28

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

4 _____

5 _____

6 _____

7 Do you have an attorney for this petition? Yes No

8 If you do, give the name and address of your attorney:

9 _____

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

13 Executed on 9/21/09

14 Date

Signature of Petitioner

19 (Rev. 6/02)

21

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27

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1 Claim one: This petition should be granted because appellants
 2 constitutional rights to represent himself and to due process of
 3 law were violated by the trials courts refusal to allow appellant
 4 to represent himself unless I was prepared to begin trial with
 5 no continuance whatsoever thereby requiring me to proceed to
 6 trial represented by an attorney with whom I had a long-
 7 established conflict and in whom I had no confidence, trust
 8 or faith in...

(A) Supporting facts: I had a rocky relationship with my court-
 appointed counsel. Prior to my preliminary hearing, I filed a
 10 marsden motion complaining, inter alia, that my attorney had rarely
 11 conferred with me. Counsel advised the court that my case had
 12 been assigned to another attorney while he had been on paternity
 13 leave but he was now back on the case. After he promised to visit
 14 me twice in the next two weeks, the court denied my motion. (ART 3-7)
 15 A month later, on the date of my preliminary hearing, I made
 16 a second marsden motion. I stated that I had not only seen my
 17 lawyer four times since October of the previous year. (ART.2)
 18 Court denied motion (ART7).

20 On October 4, 2006, the day set for the hearing of in limine
 21 motions at the beginning of trial prior to selection of the
 22 jury, I filed a third marsden motion (ART 1-8.) In my written
 23 motion, I complained that I had no TRUST in my lawyer and
 24 had not received a discovery packet for my case, "so I might
 25 be able to help myself." (ART5.) At the hearing on the motion, I
 26 told the trial judge that "I have no confidence in my lawyer.
 27 I have no TRUST or FAITH in him." (ART 21.)

28 The court denied the motion (marsden). (ART 26-27.) At that

1 point, I told the court I "wanted to exercise my constitutional
2 right to go proper" (3 RT 29). The court gave me
3 form to complete and recessed until the district attorney, who
4 had been excluded during the Marsden hearing(s) returned. (3 RT 30)

5 The court revised the form from me and I indicated that I
6 was giving up my right to counsel "with outrage." (3 RT 32-33) The trial
7 judge then advised me that I was prepared to begin the in-
8 limine motions that day, and I asked if the trial could be contin-
9 ued for "a week or so." (3 RT 35). The following colloquy took place:
10 The court: You understand what we are going to start proceedin-
11 gs immediately?
12 The defendant: we can't put it off for like a week or so?

13 The court: No

14 The defendant: why not?

15 The court: Because this case has been assigned for trial, both
16 sides are ready, and we have an officer that's going to be test-
17 ifying in an evidentiary hearing, it's called a 402 hearing, to
18 determine whether or not the court is going to allow your
19 statement or confession to the officer be admissible into
20 evidence; that's a hearing we will do this morning. I asked
21 you if you are ready to proceed and you said you were
22 ready. If you are not ready to proceed, then I will not allow
23 you to represent yourself. Mr. Alvarez will continue to represent
24 you.

25 The defendant: why is it so hard for me to fire MR. Alvarez? It's
26 a conflict of interests here. It's been for x amount of months. Each
27 Judge -- obviously, it's not me the right to dismiss him (sic).

28 The court: Okay. All I could tell you, based on what I heard this

1 morning, your motion to have him substituted as attorney of
2 record is denied. Now we will proceed to trial, and we are either
3 going to proceed with Mr Alvarez representing you or you
4 representing yourself, but only if you are prepared to start today.
5 If you are not prepared--

6 The defendant: I am not prepared.

7 The court: Then are are--

8 The defendant: I don't have a full discovery packet.

9 The court: Okay, your request to represent yourself is
10 denied. At this time, Mr Alvarez will continue to be your attorney,
11 okay; and we will proceed with the 402 hearing. The point is
12 Mr. Knight, is that I'm ~~doing~~ not going to delay the trial. We
13 are ready to proceed and earlier you told me you were
14 ready to go forward with the trial and I said fine. If you
15 are ready to go forward with the trial and I am convinced
16 that you would intelligently and knowingly waive your right
17 to an attorney, then I will allow you to represent yourself. I
18 think it's a bad idea because you just simply do not have
19 the law school education, the experience Mr. Alvarez has, but
20 that's your right. You want to represent yourself, I will allow
21 you to do so before starting today.

22 The defendant: How could I represent myself, I don't have
23 my full discovery packet?

24 The court: Well--

25 The defendant: He hasn't given me nothing... (3 RT 35-37)

26 (B) The trial court denied me my constitutional right to self representation by conditioning that right on appellant being ready to
27 immediately commence trial even though I had not been provided
28

1 with discovery.

2 The United States Supreme Court held in *Faretta vs. California*
 3 (1975) 422 U.S. 806, that a criminal defendant has a constitutional
 4 right to self-representation under the Sixth Amendment to the
 5 United States Constitution if he voluntarily and intelligently elects
 6 to represent himself. (*Id.*, at pp. 818-19, 835; *People vs. Windham*
 7 (1971) 19 Cal. 3d 121, 124). The *Faretta* opinion, however, did not discuss the
 8 timing of the request for self-representation. (*People vs. Givan* (1992)
 9 4 Cal. App. 4th 1107, 1112.) This court addressed this issue in *Windham*,
 10 concluding that "in order to invoke the constitutionally mandated
 11 unconditional right of self-representation a defendant in a criminal
 12 trial should make an unequivocal assertion of that right within a
 13 reasonable time prior to the commencement of trial." (*Id.*, at pp. 127-
 14 128). "However, once a defendant has chosen to proceed to trial
 15 represented by counsel, demands by such defendant that he be
 16 permitted to discharge his attorney and assume the defense himself
 17 shall be addressed to the sound discretion of the court." (*Id.*, at
 18 p. 128; *People vs. Bloom* (1989) 48 Cal. 3d 1194, 1220).

19 This court in *Windham*, however, in imposing the reasonable time
 20 requirement, cautioned that it "must not be used as a means of limiting
 21 a defendant's constitutional right of self-representation." *Windham*, *Supra*,
 22 at p. 129, fn. 5) The court explained the requirement's purpose is to
 23 prevent the defendant from misusing "the *Faretta* mandate as a means
 24 to unjustifiably delay a scheduled trial or to obstruct the orderly
 25 administration of justice. For example, a defendant should not be permitted
 26 to wait until the day preceding trial before he moves to represent him-
 27 self and requests a continuance in order to prepare for trial without some
 28 showing of reasonable cause for the lateness of the request." (*Ibid.*)

1 The court further explained that "when the lateness of the
 2 request and even the necessity of a continuance can be reasonably
 3 justified the request should be granted. when, on the other hand,
 4 a defendant merely seeks to delay the orderly processes of justice,
 5 a trial court is not required to grant a request for self-
 6 representation without any ability to test the request by a reasonable
 7 standard." (*Ibid.*)

8 Applying Faretta and Windham to the case at bench, appellant Knight's
 9 request "can be reasonably justified" and my request should have
 10 been granted. The record reflects that ~~appellant~~ appellant had been
 11 dissatisfied with my court-appointed counsel for more than six months
 12 prior to trial. I made my Faretta motion only after my third Marsden
 13 motion had been denied. My request for a continuance was also reasonable.
 14 One of the reasons for my Marsden motion was that my attorney
 15 had not provided me with a discovery packet "so I might be able to
 16 help myself." (ACTS) I could not be expected to proceed to trial
 17 without ~~a complete~~ the prosecutor's discovery in the case, information
 18 which a competent attorney would have received well before
 19 trial.

20 The ruling of the appellate court below that appellant's request was not
 21 timely conflicts with Windham and with several lower court opinions
 22 which ruled that a Faretta motion was timely when made prior to jury
 23 selection - see, e.g. (People vs. Nicholson) (1994) 24 Cal. App. 4th 584, 592;
 24 People vs. Herrera (1986) 104 Cal. App. 4th 167, 175. Here, my request was made
 25 6 days before jury selection was commenced and 9 days before
 26 testimony was taken.

27 "The fact that I requested the continuance because I truly needed
 28 discovery, and not to delay the trial is further evidenced by my two

1 additional Madsen motions on Oct. 5 and 10, 2006 once trial had
 2 commenced. (3PT 80-84, 93-100) My major complaint in both of
 3 these motions was that I still had not received discovery from
 4 my attorney."

5 This court held in People vs. Maddox (1967) 67 Cal.2d 647, that it was
 6 an abuse of discretion and a denial of due process to deny a request
 7 for a reasonable continuance to allow an in pro per defendant to
 8 prepare a defense. The factual situation in Maddox is closely
 9 analogous to that presented here. Defendant Maddox's request to
 10 represent himself, which had repeatedly been denied previously, was
 11 granted by a trial judge on the day set for trial. The defendant
 12 asked for a continuance because he had not "had the opportunity to
 13 look--to go to the law library to prepare to subpoena any
 14 witnesses." The court denied the request for a Continuance and
 15 directed the impaneling of the jury. (*Id.*, at pp. 649-650).

16 This court noted that an in proper defendant is
 17 not entitled to "privileges and indulgences not accorded to
 18 defendants who are represented by counsel," quoting from
 19 People vs. Mattson (1959) 51 Cal.2d 777, 794), but neither is he
 20 entitled to "less consideration than such persons. In particular he must
 21 be given, if a reasonable continuance is necessary for this
 22 purpose, it must be granted upon timely request. To deny him that
 23 opportunity would be to render my right to appear in propria
 24 persona an empty formality, and in effect deny me the
 25 right to counsel." (*Id.*, at p.653) (Emphasis in original). (See
 also People vs. Sheppard (1957) 59 Cal.App.4th 1108, 1175).

27 The maddox court further noted that this court had
 28 established a rule in People vs. Carter (1967) 66 Cal.2d 166,

1 671-672, that a defendant awaiting trial in pro proprio persona
 2 should, at a minimum, be allowed access to such legal materials
 3 as are available at the facility in which he is confined.
 4 (Id., at p. 655, n.5) The court reversed McCloud's judgment of
 5 conviction. (See also People vs. Wilkins (1990) 225 Cal. App.
 6 3d 299, 304).

7 I was forced to go to trial with an attorney whom the
 8 record clearly reflects I did not trust, could not commu-
 9 nicate with and did not believe was adequately representing
 10 me. I accepted the attorney only because I had "no other
 11 choice," given the fact that I was denied a continuance to
 12 obtain discovery which was essential for me to adequately
 13 represent myself.

14 (c) whether the erroneous denial of my constitutional right to
 15 represent myself is reversible per se or the abuse of discretion
 16 standard is applicable, my judgment of conviction must be reversed.

17 A defendant's constitutional right of self-representation is
 18 one aspect of the constitutional right to present a defense
 19 under the Sixth Amendment. (See, e.g., People vs. Rolan (2005)
 20 35 Cal. 4th 646, 654). The erroneous denial of this right is
 21 reversible per se. (McKaskle vs. Wiggins (1984) 465 U.S. 168,
 22 177 n. 8; People vs. Dent (2003) 30 Cal. 4th 213, 217).

23 More specifically, to deny a pro per defendant the resources
 24 to prepare for his defense is to render him the right to
 25 self-representation an empty formality and to in effect
 26 deny him the right to counsel. (McCloud, *supra* at p.
 27 653) Such an error is prejudicial and requires reversal.
 28 (People vs. Schulz (1992) 5 Cal. 4th 563, 574).

1 However, if this court believes that my Faretta request,
 2 which was made after my case had been assigned to a trial
 3 department but before jury selection began and before any
 4 in limine or pretrial motions had been litigated, was made
 5 at a point that the abuse of discretion standard was
 6 applicable, I urge that the court below abused its discretion.
 7 This court wrote in Windham:

8 When such a mid-trial request for self-representation is
 9 presented the trial court shall inquire *sua sponte* into the
 10 specific factors underlying the request thereby ensuring a
 11 meaningful record in the event that appellate review is
 12 later required. Among other factors to be considered by the
 13 court in assessing such requests made after the commencement
 14 of trial are the quality of counsel's representation of
 15 the defendant, the defendant's poor proclivity to substitute
 16 counsel, the reasons for the request, the length and stage of
 17 the proceedings and the disruption or delay which might
 18 reasonably be expected to follow the granting of such a motion.
 19 (19 Cal. 3d at p. 128).

20 The court abused its discretion because it considered only
 21 one of these factors: that granting my Faretta motion
 22 would result in a delay, albeit a delay only of "a week or
 23 so." The court did not consider other factors which militated
 24 in favor of granting the motion. For example, although
 25 I had previously asked to substitute counsel, it had always
 26 been the same counsel. For months, I had filed Marsden
 27 motions against the same attorney. Moreover, the Faretta
 28 request was not made "mid-trial" but rather before jury

1 Selection had even commenced and before any witness
 2 motions had been heard. Finally, the district attorney would
 3 not have been seriously inconvenienced by a brief delay of
 4 the 30 witnesses called, 19 were local law enforcement officers
 5 and the remaining 11 were local lay persons.

6 The court's conclusion in People vs. Nicholson, supra,
 7 24 cal. App. 4th 584, that the error in denying Faretta
 8 motions was not harmless is relevant here:

9 Faretta is based on the belief that the State may not
 10 constitutionally prevent a defendant from controlling his own
 11 fate by forcing on him counsel who may present a case
 12 which is not consistent with the actual wishes of
 13 the defendant. (People vs. Windham, supra, 19 Cal. 3d
 14 at p. 130) Had Nicholson and Goldsberry been permitted
 15 to control their own fate, the evidence against them
 16 would have been no less overwhelming. But we simply
 17 cannot discount the fact that it might have been
 18 to their advantage to conduct voir dire and to
 19 present opening statements and closing arguments,
 20 thereby giving the jury an inconvenience of cross-exa-
 21 mination. (Cf. People vs. Tyner, supra, 76 Cal. App. 3d at p.
 22 356; People vs. Herrera, Supra, 104 Cal. App. 3d at p.
 23 175). While it seems safe to say the defendants could
 24 not under any circumstances have been acquitted,
 25 they might have been able to avoid a true finding
 26 on the special circumstance allegation.

27 Furthermore, the timing issue in this case is, as
 28 indicated at the outset, a close call. Had ~~the~~ taken

1 the position that the motions were timely because
 2 trial had not commenced on August 4 and that it did
 3 not in fact begin until August 10, the erroneous denial
 4 of the motions would per se require reversal. All things
 5 considered, we cannot say the error was harmless. (Id.
 6 at p.595).

7 The same may be said of the instant case. The
 8 trial court's denial cannot be considered harmless
 9 beyond a reasonable doubt under *Chapman vs Calif
 10 Denia* (1967) 386 U.S. 18, 24. I did not testify at
 11 trial and representing myself would have given the
 12 jury "an opportunity to hear from" me.

13 The reversal of my judgement of conviction is
 14 required by the words of the United States
 15 Supreme court in *Faretta, Supra*, itself:

16 To force a lawyer on a defendant can only lead him
 17 to believe that the law contrives against him.
 18 Moreover, it is not inconceivable that in some rare
 19 instances, the defendant might in fact present his
 20 case more effectively by conducting his own defense.
 21 Personal liberties are not rooted in the law of
 22 averages. The right to defend is personal. The defend-
 23 ant's and not his lawyer or the state, will bear the
 24 personal consequences of a conviction. It is the
 25 defendant, therefore, who must be free personally to
 26 decide whether in his particular case counsel is
 27 to his advantage. And although he may conduct
 28 his own ultimately to his own detriment, his

choice must be honored out of "that respect for the individual which is the lifeblood of the law." Illinois vs. Allen, 397 U.S. 337, 350-351 (Brennan, J., concurring) ~~422~~. (422 U.S. at p.834)

Appellant (me) was denied his constitutional right to due process of law by being forced into the untenable choice of either^① representing himself but without discovery to which he was entitled and without a short continuance to obtain and review that discovery last with whom appellant had a well-established and long-standing conflict and in whom he had no confidence, trust or faith. (3RT 21). As a result, this petition should be granted and the matter remanded for a new trial.

Claim two: This petition should be granted because the trial court's admission of appellant's (me) taped inculpatory statement violated my constitutional rights and requires reversal of my judgment of conviction.

(A) Introduction ...

Santa Clara County police detective Brian Gilbert testified at a H.O.T. hearing on the first day of trial that he interviewed me at the Santa Clara police department on the day of my arrest (3RT 38-40). The interview was audiotaped and video taped. (3RT 43-44). Gilbert testified that he read me my miranda rights and I said I understood them, but he did not ask me if I waived my rights or if

(11)

1 I wished to speak to the officer. He just started
 2 asking questions. (3 RT 43, 54). This was the officers
 3 standard approach.

4 Counsel for appellant (me) moved to suppress my
 5 statements on the ground that there was no
 6 express waiver of my Miranda Rights. (3 RT 62-63).
 7 The court denied my motion (3 RT 89) and the
 8 video tapes of my inculpatory statements were
 9 admitted into evidence by the prosecutor at
 10 trial and transcripts of the tape were given to
 11 the jurors. (5 RT 580-83; RT 613-18; 7 RT 655, 665-
 12 66).

13 The trial court erred in denying my motion to
 14 suppress the incriminating statements because the
 15 prosecution failed to demonstrate that my statements
 16 were made voluntarily and that I waived my Miranda
 17 Rights.

18 (B.) The prosecution failed to prove that I waived
 19 my Miranda Rights.

20 In *Miranda vs. Arizona* (1966) 384 U.S. 436, the
 21 United States Supreme Court addressed the admissibility
 22 of statements obtained from an individual
 23 who is subjected to custodial police interrogation and
 24 set forth certain procedures to assure that the
 25 individual is accorded his privilege under the
 26 Fifth Amendment of the Federal Constitution not to
 27 be compelled to incriminate himself. The Court held:
 28 "When an individual is taken into custody OR

(12)

1 otherwise deprived of his freedom by the authorities
 2 in any significant way and is subjected to questioning,
 3 the privilege against self-incrimination is jeopardized.
 4 Procedural safeguards must be employed to protect
 5 the privilege and unless other fully effective means
 6 are adopted to notify the person of ~~his~~ rights ~~will~~
 7 of silence and to assure that the exercise of
 8 the right will be scrupulously honored, the follow-
 9 ing measures are required. He must be warned prior
 10 to any questioning law that he has the right to the
 11 presence of anything he says can be used against him
 12 in the court of law and ⁽¹⁾ he has the right to the presence
 13 of an attorney and that if he could not afford an attorney
 14 one will be appointed for him prior to any questioning if
 15 he so desires. Opportunity to exercise these rights must
 16 be afforded to him throughout the interrogation.

17 (3) after such warnings have been given and such
 18 opportunity afforded him the individual may knowingly
 19 and intelligently waive these rights and agree to answer
 20 questions or make a statement. But unless and until such
 21 warnings and waiver are demonstrated by the prosecut-
 22 tion at trial, no evidence obtained as a result of
 23 interrogation can be used against him." (384 U.S. at
 24 pp. 478-479). (Italics added, fn. omitted). The court in
 25 *Miranda* also held that "a valid waiver will not be
 26 presumed simply from the silence of the accused after
 27 warnings are given or simply from the fact that a
 28 confession was in fact eventually obtained." (Id. at p.

(13)

1 475).

2 In this case, officer Gilbert asked me if I understood
 3 each of the rights and I responded, "Yeah"
 4 but Gilbert did not ask me if I wanted to waive
 5 my rights and talk to the officers. Nor did he
 6 ask me to sign a written waiver form. Instead,
 7 he immediately continued to interrogate me.

8 Although an express waiver or oral statement of
 9 waiver of one's Miranda rights "is usually strong
 10 proof of the validity of that waiver," it is not
 11 necessary to establish waiver. (See, e.g., North Carolina
 12 vs. Butler (1979) 441 U.S. 369, 373). "The question is
 13 not one of form, but rather whether I, in fact, knowingly
 14 and voluntarily waived the rights delineated in the
 15 Miranda case. As was unequivocally said in Miranda,
 16 mere silence is not enough. That does not mean that
 17 the defendant's silence, coupled with an understanding of
 18 his rights and a course of conduct indicating waiver,
 19 may never support a conclusion that a defendant
 20 has waived his rights. The courts must presume
 21 that a defendant did not waive his rights; the
 22 prosecution's burden is great; but in at least some
 23 cases waiver can be clearly inferred from the
 24 actions and words of the person interrogated."
 25 (Ibid.).

26 To satisfy the prosecution's heavy burden, it
 27 must introduce sufficient evidence to establish
 28 that under the "totality of the circumstances,"

(14)

1 the defendant was aware of "the nature of the
 2 right being abandoned and the consequences of
 3 the decision to abandon it" (~~Moran~~ vs. Burline (1986)
 4 475 U.S. 412, 421). The government's burden to make
 5 such a showing "is great," and the court will "indulge
 6 every reasonable presumption against waiver of
 7 fundamental constitutional rights." (United States
 8 vs. Hecht (9th Cir. 1984) 745 F.2d 1275, 1277 (citing
 9 Johnson vs. Zerbst (1938) 304 U.S. 458, 464).
 10 Because of the circumstances discussed in Section
 11 A., this court should grant this petition and reverse
 12 appellants (me) judgement of conviction and remand the
 13 matter for a new trial without the admission of my
 14 inculpatory statements as there was no expression of
 15 waiver of my Miranda rights.

16 (c) Admission of Appellants Inculpatory Statement was not
 17 harmless beyond a reasonable doubt.

18 Admission of my statement was most prejudicial.
 19 Without the statement, the prosecution's case would have
 20 been weaker. As the Supreme Court said in *Arizona*
 21 vs. *Fulminante* (1991) 499 U.S. 279, a defendant's inculpatory
 22 statement "is probably the most probative and damaging
 23 evidence that can be admitted against him." (Id.; at
 24 p. 296). It "is not just another piece of evidence;
 25 it is the one item that, alone, can form the
 26 basis of conviction by removing what otherwise
 27 would be a reasonable doubt." (Ibid.); *Collazo* vs.
 28 *Estelle* (9th Cir. 1991) 940 F.2d 411, 424 (en banc),

(15)

1 cert. den. 502 U.S. 1031).

2 The importance of my admissions is seen by
 3 the prosecutor's repeated references to them in
 4 both portions of his closing argument. (See, e.g., 7 RT
 5 768-771, 801-805 809). Obviously, the prosecutor
 6 considered my statement significant or he would not
 7 have mentioned it so prominently in his summation.
 8 At this court has observed, "there is no reason why
 9 we should treat this evidence as any less 'crucial'
 10 than the prosecutor -- and so presumably the
 11 jury -- treated it." (People vs. Cruz (1964) 61 Cal. 2d
 12 861, 868, See also (People vs. Powell (1967) 67 Cal.
 13 2d 32, 57; People vs. Pantoya (2004) 122 Cal. App.
 14 4th 1, 14-15). The Ninth Circuit has also recognized,
 15 in asserting prejudice, "statements from the
 16 prosecutor matter a great deal." (United States vs.
 17 Kojayan (9th Cir. 1993) 8 F.3d 1315, 1323. See also
 18 Kyles vs. Whitley (1995) 514 U.S. 419, 444).

19 When a trial court has erroneously admitted a
 20 defendant's involuntary statement(s) or confession(s), the
 21 error is subject to harmless error ~~analysis~~ analysis under the
 22 beyond-a-reasonable-doubt standard of Chapman vs. California
 23 (Supra, 386 U.S. 18- (Arizona vs. Fulminante, Supra,
 24 499 U.S. at p. 310). "The beyond-a-reasonable-doubt
 25 standard of Chapman requires the beneficiary of a
 26 federal constitutional error to prove beyond a
 27 reasonable doubt that the error complained of
 28 did not contribute to the verdict obtained! (citation)

(16)

1 'To say that an error did not contribute to the
 2 ensuing verdict is... to find that error unimportant in
 3 relation to everything else the jury considered on
 4 the issue in question, as revealed in the record.'
 5 (citation). Thus the focus is what the jury actually
 6 decided and whether the error might have
 7 tainted its decision. That is to say, the issue is 'whether
 8 the... verdict actually rendered in this trial was surely
 9 unattributable to the error' (citation). (People vs. Neal)
 10 (2003) 31 Cal.4th 63, 86).

11 Here, it cannot be said that the jury's verdict
 12 was "surely unattributable" to the admission of my
 13 incriminating statements, and therefore, this petition
 14 should be granted and my judgement of conviction
 15 should be reversed.

16 **Claim Three:** This petition should be granted because
 17 the trial court's imposition of consecutive sentences on
 18 counts 1, 2, 6 and 8 on section 12022.53(b)
 19 enhancements violated appellate's (me) constitutional
 20 right to jury trial.

21 Although my trial counsel discussed Cunningham
 22 vs. California (2007) 549 U.S. 270, with the trial court
 23 at sentencing (see 7 RT 841), the court ruled that: "I
 24 believe that it's clear that the decision which to
 25 impose concurrent or consecutive sentencing under
 26 California Sentencing law is not precluded by decisions
 27 in Apprendi, Blakely or Cunningham." (7 RT 846). The court
 28 sentenced me to consecutive sentences on counts one,

(17)

1 two and three .(RET 842-845).

2 I recognized, since the date of my sentencing, this
 3 court has ruled in people vs. Black (2007) 41 cal. 4th 799
 4 (Black II), that a jury trial is not required on the factors
 5 that justify imposition of consecutive sentences. I'm hoping this
 6 court reconsiders its decision in Black in the light of the
 7 United States Supreme Court's grant of a petition for a writ
 8 of certiorari in the case of Oregon vs. Ice (2006) 343 OR
 9 243, 170 P. 3d 1049, cert. granted (3/17/08) 128 S.Ct. 1657, 170
 10 L.Ed.2d 353 (No. 07-901). Ice was convicted of six felony
 11 charges. Over defense counsel's objections that Appendix V
 12 New Jersey (2000) 530 U.S. 466, required that a jury
 13 determine the facts on which consecutive sentences
 14 could be imposed, the trial court imposed consecutive
 15 sentences.

16 The Oregon Supreme Court reversed, holding that the
 17 federal constitutional right to jury trial requires that
 18 facts supporting the imposition of consecutive sentences
 19 be found by a jury, rather than a judge. The United
 20 States Supreme Court has granted certiorari...

21
 22 Conclusion! For the foregoing Reasons, (I) petitioner Tenace
 23 Demand knight respectfully requests that review be
 24 granted in this matter.

25
 26
 27
 28 (18)

Mr. Terence Knight # F-75937
P.V.S.P (ASU-157)
Po. Box 9505
Sacramento, Ca. 93210



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